No. 17-130

In The
Supreme Court of the United States

RAYMOND J. LUCIA, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF ASSOCIATION OF ADMINISTRATIVE LAW JUDGES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMING THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Decision Below Was Correct Because Congress Did Not Confer The Sovereign Power Of The United States On SEC ALJs 3

A. Congress Creates an Office Only when It Delegates Sovereign Power in the Form of Authority to Bind the Government or Third Parties 4

B. Congress Did Not Delegate Sovereign Authority to SEC ALJs Because They Lack the Power to Render and Enforce Final, Binding Decisions 5

II. Any Ruling That SEC ALJs Are Inferior Officers Should Not Control For ALJs In Other Agencies 12

A. The "Significant Authority" Test May Play Out Differently across Agencies when Agency-Specific ALJ Duties Are Considered 13

B. SEC ALJs Exercise Significantly More Authority than Most Other ALJs 16

C. SSA Judges Exemplify Why ALJs Are Not Inferior Officers 19

Page

III. This Court Should Not Reach The Removal Question, But The APA Provisions Regarding Removal Are Constitutional 28

A. The Removal Question is Not Presented.... 28

B. The APA Removal Provision Is Constitutional Because ALJs Perform Quasi-Judicial Functions and the APA Permits Sufficient Executive Control ... 30

CONCLUSION 39

APPENDIX

AALJ National Executive Board..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Soc. Sec. Admin., 703 F.3d 538 (Fed. Cir. 2012) 36

Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402 (7th Cir. 2015) 25, 26

Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984) 25

Buckley v. Valeo, 424 U.S. 1 (1976) 4

Butz v. Economou, 438 U.S. 478 (1978) 9

Dames & Moore v. Regan, 453 U.S. 654 (1981) 31

Edmond v. United States, 520 U.S. 651 (1997) .. 4, 9, 11

Free Enterprise Fund v. Public Co. Acctg. Oversight Bd., 561 U.S. 477 (2010) ..... *passim*

Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991) 4, 6

Heckler v. Campbell, 461 U.S. 458 (1983) 21

Heckler v. Day, 467 U.S. 104 (1984) 20, 25

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 33, 34

Moore v. Apfel, 216 F.3d 864 (9th Cir. 2000) 22

Morrison v. Olson, 487 U.S. 654 (1988) 35, 37

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 30

Mullen v. Bowen, 800 F.2d 535 (6th Cir. 1986) 23

NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) 30

Page

Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953) 6, 9, 14, 15, 27

Richardson v. Perales, 402 U.S. 389 (1971) ..... *passim*

Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986) 21

Schweiker v. Hanson, 450 U.S. 785 (1981) 22

SEC v. Chenery Corp, 332 U.S. 194 (1947) 22

Shapiro v. Soc. Sec. Admin., 800 F.3d 1332 (Fed. Cir. 2015) 36

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United States v. Perkins, 116 U.S. 483 (1886) 33

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Wiener v. United States, 357 U.S. 349 (1958) 33, 34

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 6

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. II, § 2, cl. 2 ..... 3, 4

U.S. Const. art. II, § 3 30

Page

STATUTES:

5 U.S.C. § 554(d) 27, 32, 34
5 U.S.C. § 556 27
5 U.S.C. § 556(b) 7, 38
5 U.S.C. § 556(c) 7, 11, 12
5 U.S.C. § 556(c)(11) 12
5 U.S.C. § 557 27
5 U.S.C. § 557(b) 7, 8
5 U.S.C. § 1104(a)(2) 10
5 U.S.C. § 1202(d) 36
5 U.S.C. § 1302 14
5 U.S.C. § 3344 10
5 U.S.C. §§ 7101 *et seq.* 26
5 U.S.C. § 7103(a)(2)(A) 27
5 U.S.C. § 7103(a)(15) 27
5 U.S.C. § 7521 28
5 U.S.C. § 7521(a) 37
15 U.S.C. § 45(l) 17
15 U.S.C. § 45(m) 17
15 U.S.C. §§ 77a *et seq.* 17
15 U.S.C. § 77h-1 17
15 U.S.C. § 77h-1(a) 17
15 U.S.C. § 77t 16
15 U.S.C. § 78d-1(a) 11

Page

15 U.S.C. § 78d-1(b) 11
15 U.S.C. § 78o 17
15 U.S.C. § 78o-4 17
15 U.S.C. § 78q-1 17
15 U.S.C. § 78u(e) 8
15 U.S.C. § 80b-3 17
19 U.S.C. § 1337(f) 17
29 U.S.C. §160(e) 17
42 U.S.C. § 405(b)(1) 19
47 U.S.C. § 309(k) 14
47 U.S.C. § 312 14
42 U.S.C. §§ 401 *et seq.* 19
42 U.S.C. §§ 1001 *et seq.* 19
42 U.S.C. §§ 1381 *et seq.* 19
42 U.S.C. §§ 1395 *et seq.* 19

REGULATIONS:

5 C.F.R. Part 930 14
5 C.F.R. § 930.204(h) 10
12 C.F.R. § 263.29(b) 18
12 C.F.R. § 1081.105(c) 18
12 C.F.R. § 1081.201(d) 18
12 C.F.R. § 1081.203(e) 18
12 C.F.R. § 1081.212(c) 18
16 C.F.R. § 3.24(a) 18

Page

17 C.F.R. § 10.91(a) 18
17 C.F.R. § 201.112(b) 18
17 C.F.R. § 201.155(a)(3) 18
17 C.F.R. § 201.180(a) 12
17 C.F.R. § 201.250(c) 18
17 C.F.R. § 201.400(a) 18
18 C.F.R. §§ 385.206-.207 14
20 C.F.R. §§ 404.900-.996 23
20 C.F.R. § 404.967 23
20 C.F.R. § 404.969(a) 23
20 C.F.R. § 404.969(b) 23
20 C.F.R. § 404.969(b)(1) 23
20 C.F.R. § 416.1467 23
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20 C.F.R. § 416.1469(b)(1) 23
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24 C.F.R. § 100.10 17

OTHER AUTHORITIES:

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Asher C. Hinds, 1 *Hinds' Precedents of the House of Representatives* 604 (1907) 5, 21

Page

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Exchange Act Release No. 70,708 (Oct. 17, 2013) 12

Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RESERVE L. REV. 1083 (2015) 36

Hearings, Appeals and Litigation Law, HALLEX 21I-1-0-3 21

Hearings, Appeals and Litigation Law, HALLEX I-2-1090 22

Horsky & Mahin, *The Operation of the SSA Administration and Decisional Machinery* (1960) 7

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Page

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U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 83 (1947) 8

Victor G. Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal & Policy Factors*, 6 W.N. ENG. L. REV. 593 (1984) 6, 7

INTEREST OF *AMICUS CURIAE*[1]

The Association of Administrative Law Judges (AALJ) represents the interests of 1460 non-supervising ALJs employed by the Social Security Administration (SSA)—nearly three-quarters of all ALJs serving across the federal government—and as such has a keen interest in this case. AALJ was founded as a professional association in 1971 and has affiliated since 1999 with the International Federation of Professional and Technical Engineers, AFL-CIO.[2]

AALJ aims to preserve the integrity and independence of the administrative judiciary. Its objectives include securing the guarantees of the U.S. Constitution, the Administrative Procedure Act, the Social Security Act, and all other federal laws; supporting the professional growth of ALJs; and improving the working conditions of ALJs through collective bargaining, political action, and other means, like participating in several notable court cases involving judicial independence.

All AALJ's activities, including the filing of this brief, further the Association's goal of protecting

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] Office of Personnel Management (OPM) data show 1655 ALJs serving at SSA as of March 1, 2017. *See* https://goo.gl/Vf8UV4. By March 2018, roughly 1700 ALJs (including supervisory ALJs) were serving at SSA, according to agency data.

judicial independence and preserving due process in administrative adjudication.[3]

SUMMARY OF ARGUMENT

The D.C. Circuit's judgment should be affirmed because Congress intended ALJs to be federal civil service employees, who act as impartial and independent fact-finders in building records and rendering initial decisions free from bias and political control, but lack coercive authority to bind either the government or third parties.

Because every agency's organic statute and internal deployment of ALJs are distinct, even if SEC ALJs are considered inferior officers, that ruling should not control for other ALJs; especially those like SSA ALJs who do not preside over adversarial enforcement proceedings.

The inverse proposition, however, would hold. Because SEC ALJs exercise more authority through a unique variety of agency-conferred duties than do most other ALJs, if this Court were to hold that SEC ALJs are federal employees, then the same would be true for all ALJs. Affirmance of the judgment would thus firmly shut a Pandora's Box of otherwise unending agency-by-agency litigation contesting the

[3] The Association's Constitution is available at https://goo.gl/KQNphN. AALJ's National Executive Board members are listed in the Appendix.

specific duties discharged by each agency's ALJs, and the precise nature of their appointments.

Finally, this Court should not reach the removal question, which was not pressed or passed on below and is not independently worthy of review. But if it does, it should hold that ALJ removal protections are consistent with Article II given ALJs' status as quasi-judicial officers.

ARGUMENT

I. The Decision Below Was Correct Because Congress Did Not Confer The Sovereign Power Of The United States On SEC ALJs.

The decision to create an office within the meaning of the Appointments Clause belongs in the first instance to Congress, which must "establish[] [it] by Law." U.S. Const. Art. II, § 2, cl. 2. Such establishment requires a delegation of the sovereign power of the United States to the office, meaning the authority to bind the government or the public in the name of the United States.

Congress did not confer that sort of sovereign authority on ALJs generally when it created them as a special class of employees within administrative agencies. Rather, by requiring impartial initial administrative adjudications but preserving plenary agency authority over all final decisions, Congress made plain that the sovereign authority of the United

States was vested in agency heads, not ALJs. Nor did Congress confer sovereign authority on SEC ALJs specifically, addressing them only as assistants to the Commission who lack the authority to bind the Commission or third parties.

A. Congress Creates an Office Only when It Delegates Sovereign Power in the Form of Authority to Bind the Government or Third Parties.

The line between inferior officers and employees rests on at least three constitutional minimums. The starting point is that Congress must create the office "by Law." U.S. Const. Art. II, § 2, cl. 2; *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991).

Next, under both historical and current understanding, the law must delegate some portion of the sovereign power of the United States to the officer. *See* Br. for Court-Appointed *Amicus Curiae*, at 24-25, 28 (hereafter "Court-Appointed *Amicus* Br."); *Edmond v. United States*, 520 U.S. 651, 662 (1997) ("The exercise of 'significant authority pursuant to the laws of the United States' marks . . . the line between officer and nonofficer.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)); *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73 (2007) (hereafter "OLC Opinion"), 2007 WL 1405459, at *5-*10 (collecting sources from the Founding era and thereafter).

Finally, the authority to bind in the name of the officer (not on behalf of a superior) is an essential part of the exercise of the sovereign authority and thus of constitutional officer status. *See* Court-Appointed *Amicus* Br. 25-34; OLC Opinion, 2007 WL 140545, at *11 (surveying historical sources, case law, and other OLC Opinions to conclude that "one could define delegated sovereign authority as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit"); Asher C. Hinds, 1 *Hinds' Precedents of the House of Representatives* 604, 610 (1907) (describing 1899 report of the Judiciary Committee of the House of Representatives concluding that commissioners were not officers of the United States when they were "mere advisory agents" with "no power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen").

B. Congress Did Not Delegate Sovereign Authority to SEC ALJs Because They Lack the Power to Render and Enforce Final, Binding Decisions.

Congress created SEC ALJs as employees, not officers, because SEC ALJs lack the authority to bind the government and third parties under either the APA or the organic statutes governing the SEC. In this analysis, the duties conferred by Congress—rather than agency rule—are the most informative, because only statutorily-conferred duties reflect Congress's intent (or not) to establish a constitutional office by

law. Considering those duties, SEC ALJs do not exercise significant authority under the laws of the United States. Their statutory duties include *neither* final decision-making authority *nor* enforcement power, unlike the special trial judges in *Freytag* (who could enforce discovery orders in all cases and make final decisions in many, 501 U.S. at 881-82).

1. The creation in the APA of ALJs (then hearing examiners) as "classified Civil Service employees," *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 133 (1953), was a grand compromise between two competing objectives: agency control and adjudicative impartiality. How Congress ultimately struck the balance confirms that ALJs are employees, not officers. ALJs assist agencies through impartial fact finding and adjudication—but the agency may disregard their determinations at will.

a. As other *amici* have well described,[4] the Administrative Procedure Act was extraordinary legislation, passed unanimously by both houses, only after "a long period of study and strife," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 39-41 (1950). Among the "key objectives" of the Act was the "prevention of agency abuses of examiners' integrity and impartiality." Victor G. Rosenblum, *Contexts and*

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[4] *See, e.g.*, Br. for Administrative Law Scholars as *Amici Curiae* in Support of Neither Party, at 6-11 ("Pierce Br."); Br. for Forum of United States Administrative Law Judges as *Amicus Curiae* in Support of Neither Party, at 4-8 ("Forum Br."); Br. for Federal Administrative Law Judges Conference as *Amicus Curiae* in Support of Neither Party, at 4-7 ("FALJC Br.").

Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal & Policy Factors, 6 W.N. ENG. L. REV. 593, 609 (1984). Congress thus placed "trial examiners, and other similar employees" in the civil service to prevent political appointments to these positions. *Administrative Procedure: Hearings Before a Subcomm. of the S. Comm. On the Judiciary*, 77th Cong. 250, 876, 1000 (1941).

Although protected from political interference, Congress intended the ALJ to still serve as a "member of a regulatory team—independent of the agency to be sure . . . but nonetheless subordinate in the sense that his work must mesh with and adapt to conform itself to the role and responsibility of the agency." Rosenblum, *supra*, at 616-17 (quoting Horsky & Mahin, *The Operation of the SSA Administration and Decisional Machinery* (1960) (mimeo)).

This balance between adjudicative independence and regulatory control is reflected in the duties assigned to ALJs by the APA. ALJs preside over fact-finding hearings at which evidence will be taken, 5 U.S.C. § 556(c) (list of presiding-employee tasks), have a duty to act impartially, *id.* § 556(b) ("The functions of presiding . . . shall be conducted in an impartial manner."), and issue initial decisions (if tasked by their agency to do so), *id.* § 557(b).

But ALJs cannot bind the agency, which has plenary authority regardless of any ALJ act or decision. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it

would have in making the initial decision . . . "); *see also* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 83 (1947) (the agency retains "complete freedom of decision—as though it had heard the evidence itself"); KENNETH CULP DAVIS, 2 ADMIN. L. TREATISE §§ 10.02-03 (1958) (noting the "APA clearly maintains the examiner in a subordinate position" in part because the "initial decision can rise no higher than a recommendation").

Consistent with their role as impartial hearing officers, ALJs also cannot bind private parties. No ALJ decision becomes the final decision of the agency without the agency's consent. 5 U.S.C. § 557(b).[5] And ALJs lack enforcement power (for interim or final decisions) in the form of contempt or otherwise. If a party ignores an ALJ-issued subpoena, the ALJ has no mechanism to compel it to submit. Rather, the agency itself (not the ALJ) ordinarily must go to court to obtain that compulsion. *See, e.g.*, 15 U.S.C. § 78u(e) (application to court by SEC to enforce orders). The

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[5] It is irrelevant whether agency consent is exercised through an affirmative post-decision act, a blanket policy accepting all decisions in certain categories, or silent acquiescence. Regardless of procedure, the agency—not the ALJ—holds the sovereign power. If the only criterion for officer status were the ability to make a "final" decision that stands as the agency's absent a further affirmative act, it would prove far too much, because many decisions are made every day by undisputed agency employees (like the initial examiners for disability claims, *see* p. 20, *infra*), that are never appealed and never even reach the ALJ level. Simply because some agency decisions become final without express action by the agency head does not transform employees making those decisions into constitutional officers.

same is true for an ALJ decision that the agency has opted to allow to become final without review; it is not enforceable without independent agency action (and, often, an order from an Article III court). *See id.*; pp. 16-17, *infra* (discussing enforcement of orders for other agencies).

The absence of the authority to bind confirms that Congress did not delegate sovereign power of the United States to ALJs. ALJs are instead unique civil service employees insulated from political influence through tenure and removal protections. They are insulated "from political interference," *Butz v. Economou*, 438 U.S. 478, 513 (1978), and are "not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons." *Ramspeck*, 345 U.S. at 142. But they are not shielded from plenary agency policy control, and serve as front-line, advisory adjudicators—not final decision-makers.

Such plenary control over regulatory policy and administrative outcomes maintains complete political accountability within the Executive Branch for the exercise of executive power by the agency, fulfilling the objective of the Appointments Clause. *See Edmond*, 520 U.S. at 663 (the Appointments Clause is "designed to preserve political accountability relative to important Government assignments"). The mere assistance of employees, private industry, or other advisors in carrying out agency functions does not transform those assistants into officers. Providing support to the exercise of power is not the exercise of power. This Court in *Sunshine Anthracite Coal Co. v. Adkins*, 310

U.S. 381, 399 (1940), thus held that the Appointments Clause is not implicated when individuals "function subordinately to the [agency]" and were not entrusted with "law-making" power.

b. The fact that ALJ duties are fungible (and, by congressional design, variable) across agencies, reinforces that Congress did not contemplate a specific office wielding sovereign authority when it created the ALJ corps. Rather, Congress created a special class of federal employees to be impartial (but not final) fact-finders, with an elevated, universal skill set, and specific duties assigned by the agency.

Uniform qualification and examination criteria, 5 U.S.C. § 1104(a)(2), and the possibility of ALJ transfer between agencies, 5 C.F.R. § 930.204(h), *see also* 5 U.S.C. § 3344 (permitting temporary detail of ALJs from one agency to another)—most often from SSA, the largest employer of ALJs, to other agencies, *see* Pierce Br. 9—confirm the employee status of ALJs. ALJs are selected through a centralized process, where OPM, a neutral civil service agency, administers an examination for those eligible for a generic position based on objective qualification criteria. Agencies then select from an OPM certification that contains at least the three highest ranking candidates for the geographical location where they are hiring. *See* 5 U.S.C. § 1104(a)(2); FALJC Br. 7-9 & App. C (describing selection process). OPM's centralized certification process is further proof that Congress did not consider ALJs to be inferior officers, because the principal officers whom they serve do not fully control their

selection. Congress set no prescribed hierarchy as would typify a principal/inferior officer relationship.

2. Consideration of the authority conferred on SEC ALJs under the Commission's organic statutes does not alter the outcome. Although some of the authorities exercised by SEC ALJs are unique among ALJs, *see* part II.B, *infra*, the statutes governing SEC ALJs in the main strike the same balance as within the APA: the SEC may work through ALJs (or other employees) to accomplish its functions, 15 U.S.C. § 78d-1(a), but the Commission itself always retains the final decision authority. *Id.* § 78d-1(b). That leaves SEC ALJs without the authority to bind, making them fall on the employee side of the employee-officer line. *See* Court-Appointed *Amicus* Br. 44-51.

Neither the APA, 5 U.S.C. § 556(c), nor the statutes specific to the SEC, confer "significant authority pursuant to the laws of the United States," *Edmond*, 520 U.S. at 662 (internal citation omitted), on SEC ALJs. And the duties highlighted by Petitioner (Br. 21-23) that suggest greater authority for SEC ALJs are created by agency rule, not by statute. They do not reflect a congressional decision to delegate sovereign power to SEC ALJs. What's more, even those rule-based duties have been cut back in recent years, as Petitioner acknowledges. For example, the power to issue default orders (including default orders that levy sanctions and cease-and-desist obligations) is conferred by rule, but (as noted by Petitioner (Br. 32)), the Commission has, since 2013, mandated that ALJs can issue only initial decisions in such circumstances,

which require Commission action to take effect. *See* Exchange Act Release No. 70,708 (Oct. 17, 2013). Accordingly, SEC ALJs do not possess authority to issue binding default orders.

The power of redressing contemptuous conduct, 17 C.F.R. § 201.180(a), is likewise conveyed by rule, not by statute, and is very limited (and subject to *de novo* review). *See* Court-Appointed *Amicus* Br. 9. Moreover, this outlier rule should not control the constitutional analysis under the Appointments Clause, where Congress itself has declined to confer any enforcement authority on ALJs, *see* 5 U.S.C. § 556(c). Although Congress contemplated that agencies could assign additional duties related to presiding over hearings to ALJs, 5 U.S.C. § 556(c)(11), that narrow provision does not grant the agency license to establish an "office" in the absence of more explicit congressional authorization. To the extent that some SEC rules may stretch too far, the result should be that the rules are invalid, rather than undercutting Congress's careful assignment of limited powers to ALJs.

II. Any Ruling That SEC ALJs Are Inferior Officers Should Not Control For ALJs In Other Agencies.

For the reasons described above, all ALJs are employees. But if the Court concludes otherwise for SEC ALJs given their agency-conferred duties and responsibilities, that function-specific analysis should not control for ALJs from other agencies, because every

agency deploys its ALJs differently. There can be no one-size-fits-all functional approach to the Article II question. *Cf. Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 506-07 (2010) ("[T]he very size and variety of the Federal Government . . . discourage general pronouncements" on separation-of-powers questions not specifically presented).

A. The "Significant Authority" Test May Play Out Differently across Agencies when Agency-Specific ALJ Duties Are Considered.

Petitioner argues that only ALJs tasked by their agency to preside over adversarial enforcement proceedings are inferior officers, taking pains to exclude other ALJs from the reach of his argument. *E.g.*, Pet. Br. 41-42. Rightly so. ALJ authority, particularly the authority to bind others, is arguably greater when presiding over adversarial enforcement proceedings. But even for such proceedings, each agency differs in how much authority ALJs are permitted to wield.

This Court's cases, as well as the parties' careful parsing of the specific duties and functions of SEC ALJs here, confirm that the Appointments Clause analysis is fact-specific and contextualized. Yet the Government's brief, as well as some *amici*, suggest that the constitutional analysis would be the same for

all ALJs across every agency. AALJ respectfully disagrees.

As Justice Frankfurter observed, the APA established a "mood" that "must be respected . . . [that] can only serve as a standard for judgment and not as a body of rigid rules assuming sameness of applications." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). Thus, although every ALJ is subject to the same selection criteria, *see* 5 U.S.C. § 1302; 5 C.F.R. Part 930, once placed within a given agency, the duties ALJs perform vary tremendously. Some, like those at the SEC, preside over adversarial enforcement proceedings, while others, like the majority of ALJs who work for the Social Security Administration, determine eligibility for government benefits. Still others hear regulatory matters, *e.g.*, FCC hearings on licenses under 47 U.S.C. §§ 312, 309(k); or FERC hearings resolving rate disputes, 18 C.F.R. §§ 385.206-.207.[6]

ALJ duties can also vary *within* agencies. When upholding intra-agency grade differences for ALJs, the Court in *Ramspeck* noted the different roles

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[6] *See generally* Daniel Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASSOC. OF ADMIN. LAW JUDICIARY 475 (2011); *see also* Kenneth Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 & n.42 (2016). Beyond ALJs, whose independence is preserved by the APA, agencies also employ a far greater number of Administrative Judges (AJs), who often perform the same functions, and who are typically agency attorneys. *See generally id.* Whether or not sound policy, agencies' use of employee AJs interchangeably with APA ALJs is another indication of ALJs' employee status.

Civil Aeronautics Board ALJs played in safety versus economic cases, as well as differences between the "relatively simple applications for extensions" of certificates heard by ICC ALJs and other ICC proceedings "involv[ing] complicated and difficult railroad rate" determinations. 345 U.S. at 134. A functional approach to the Appointments Clause analysis, thus, might yield different results for ALJs even within the same agency.

There are also differences in how each agency appoints its ALJs; none addressed in this record. So even if this Court concludes that SEC ALJs are inferior officers and that their appointment was unconstitutional, such a holding cannot govern other ALJs for the additional reason that it is unclear how other agencies appoint their ALJs.

Here, it took years of litigation culminating in an affidavit ordered from the Commission's Deputy Chief Operating Officer to divulge the SEC's own ALJ appointment procedures. Pet. App. 298a-299a. The process would likely be no less complicated for the 30 other agencies that employ ALJs. Each, including SSA, has its own internal appointment process that is not necessarily prescribed by statute or even published rule, and that can and does change over time.

The absence of any statutory mandate governing individual agency internal hiring procedures, once ALJs have been selected by OPM, is yet further proof that Congress, in enacting the APA, did not consider

ALJs constitutional officers that required appointment in conformance with Article II.

B. SEC ALJs Exercise Significantly More Authority than Most Other ALJs.

Because SEC ALJs exercise a greater array of functions and are vested with more discretion by agency rule than other ALJs, including other ALJs who preside over adversarial enforcement proceedings, Petitioner's attempt to paint all adversarial-hearing ALJs with the same brush fails.

SEC judges are among the few ALJs (about 150) who preside over adversarial enforcement proceedings. And the expansive jurisdiction of SEC ALJs, their ability to order significant monetary penalties, and the fewer procedural protections afforded to respondents in SEC adjudications all provide greater authority to SEC judges and distinguish them from their ALJ counterparts in other agencies.

As others have chronicled,[7] SEC ALJs have authority to impose substantial monetary penalties through administrative proceedings, including the power to order disgorgement, 15 U.S.C. § 77t. SEC ALJs also have cease-and-desist powers—that is, powers prohibiting licensed firms and persons from

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[7] *E.g.*, Br. of Urska Velikonja & Joseph A. Grundfest as *Amici Curiae* in Support of Neither Party, at 7-8 (describing the Commission's expanding authority to seek monetary penalties since 1990, culminating in civil fines against non-registered entities under the Dodd-Frank Act).

violating the securities laws—and the ability to revoke licenses or bar defendants from doing securities-industry work. 15 U.S.C. § 77h-1. Although this power is always subject to the plenary authority of the SEC, it still outstrips the authority of ALJs in other agencies, largely because those other agencies are themselves less powerful than the SEC.

For example, the Federal Trade Commission and the International Trade Commission use ALJs for administrative enforcement proceedings but must seek civil penalties in a federal district court. 15 U.S.C. §§ 45(l), (m) (FTC); 19 U.S.C. § 1337(f) (ITC). The National Labor Relations Board, too, can enforce its orders remedying unfair labor practices only on application to a court of appeals. 29 U.S.C. §160(e).

Unlike many other agencies, SEC ALJs also have jurisdiction over non-regulated entities, 15 U.S.C. §§ 78o, 78o-4, 78q-1, 80b-3, and may impose (with SEC consent) monetary penalties on any individual who "is violating, has violated, or is about to violate any provision of this [title] [*id.* §§ 77a *et seq.*], or any rule or regulation thereunder." *Id.* § 77h-1(a). By comparison, other agencies are far more limited in their jurisdiction. *E.g.*, 24 C.F.R. § 100.10 (HUD's jurisdiction in Fair Housing Act cases limited to licensed or regulated businesses).

SEC ALJs also have some unique authorities under agency procedural rules. For example, SEC internal rules empower its ALJs to limit dispositive motions in 120-day proceedings, where motions for

summary disposition are available "only with leave of the hearing officer." 17 C.F.R. § 201.250(c). By contrast, dispositive motions are available without ALJ leave in other agency adjudications. *E.g.*, Consumer Financial Protection Bureau (CFPB), 12 C.F.R. § 1081.212(c); Federal Trade Commission, 16 C.F.R. § 3.24(a); Office of Financial Institution Adjudication/Federal Reserve, 12 C.F.R. § 263.29(b); and Commodity Futures Trading Commission, 17 C.F.R. § 10.91(a).

There are also fewer immediate checks on an SEC ALJ's power when compared to otherwise analogous counterparts (like the CFPB). Specifically, if a party moves to disqualify an SEC ALJ, the ALJ will rule on the motion and may continue the proceeding if the motion is denied. 17 C.F.R. § 201.112(b). Interlocutory appeals are "disfavored," and the Commission grants such appeals "only in extraordinary circumstances." *Id.* § 201.400(a). But if a party moves to disqualify a CFPB ALJ, the ALJ must certify the motion to the CFPB Director for a "prompt determination" on disqualification if he or she does not self-disqualify. 12 C.F.R. § 1081.105(c).

Finally, SEC ALJs can find that a party has defaulted for a wide range of conduct and can enter a default (subject to SEC confirmation) if a party fails to cure a deficient filing within a specified time. 17 C.F.R. § 201.155(a)(3). But a CFPB ALJ can find a party in default only where the party does not file an answer, 12 C.F.R. § 1081.201(d), or fails to appear, *id.* § 1081.203(e).

These differences in ALJ authority in adversarial enforcement actions pale in comparison to the differences across agencies in usage of ALJs more generally. As Petitioner recognizes, ALJs who run adversarial enforcement proceedings cannot be lumped together with ALJs who conduct other types of proceedings for purposes of the Article II analysis. Examining in more detail the work done by SSA ALJs, who far outnumber all other ALJs, helps explain why.

C. SSA Judges Exemplify Why ALJs Are Not Inferior Officers.

1. SSA ALJs are arguably the quintessential ALJs. SSA adjudicators served as the model for APA hearing examiners. *See Richardson v. Perales*, 402 U.S. 389, 409 (1971). And most ALJs start at the Social Security Administration before moving to positions at other agencies. The roughly 1700 ALJs working for SSA far outnumber their peers in other agencies and preside over non-adversarial administrative adjudications brought under the Social Security Act. *See* 42 U.S.C. § 405(b)(1).[8]

As then-Commissioner Astrue testified in 2012, a "key component of the integrity of [the SSA] hearings process is that ALJs act as independent adjudicators—who fairly apply the standards in the Act and our regulations. We respect the qualified decisional

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[8] *E.g.*, Titles II, VIII, XVI, XVIII of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, *id.* §§ 1001 *et seq.*, *id.* §§ 1381 *et seq.*, *id.* §§ 1395 *et seq.*

independence that is integral to the ALJ's role as an independent adjudicator." Statement of Michael J. Astrue, Commissioner, SSA, before the Committee on Ways and Means Subcommittee on Social Security, June 27, 2012 (Astrue Testimony).[9]

a. SSA ALJs are involved in one phase of an administrative process that has been described as "unusually protective" of disability claimants. *Heckler v. Day*, 467 U.S. 104, 106 (1984). An on-the-record hearing before an SSA ALJ is the *third* stage of agency review, occurring only after a claimant has been twice-denied benefits at the State level. *See generally* Astrue Testimony, *supra* (explaining the four-stage administrative review process); *see also Richardson*, 402 U.S. at 392-98 (detailing one claimant's path through the multi-level administrative process).

The hearings are non-adversarial. This Court has previously observed that "the differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Sims v. Apfel*, 530 U.S. 103, 110 (2000) (plurality op.). Unlike Article III judges, or other ALJs who preside over adversarial enforcement proceedings, SSA ALJs are oft-said to wear three hats, because in presiding over SSA non-adversarial hearings, they act as "(1) a judge, (2) a representative of the government who cross examines the claimant, and, (3) an adviser to the claimant, required by regulation to fully develop the case to see that the claimant has a fair hearing regardless of whether the

[9] *Available at* https://goo.gl/Wrgs24.

claimant is represented by counsel or otherwise." *Salling v. Bowen*, 641 F. Supp. 1046, 1053 (W.D. Va. 1986); *see also Sims*, 530 U.S. at 110-11 (describing Social Security proceedings as inquisitorial rather than adversarial, and the ALJ's duty as investigative).

This independent "duty to inquire," *Heckler v. Campbell*, 461 U.S. 458, 471 (1983) (Brennan, J., concurring), exemplifies the core fact-finding and record-building functions of ALJs as originally contemplated under the APA, and further indicates the ALJ's employee status. *See* 1 *Hinds' Precedents* at 607-08 (1899 report concluding that certain commissioners were not officers because the "mere power to investigate some particular subject and report thereon . . . does not constitute a person an officer").

And while SSA ALJs exercise discretion and independent judgment in determining eligibility for benefits and adjudicating other issues they are tasked to decide, they do so with the benefit of comprehensive agency guidelines, such as medical-vocational grids, that provide detailed schedules on medical criteria for different levels of impairment. SSA also provides internal guidance tools, like the Hearings, Appeals and Litigation Law (HALLEX) manual, intended to "communicate[] guiding principles and procedures" to SSA adjudicators. HALLEX I-1-0-3. One of these guidelines even urges ALJs to refer novel policy issues to their agency supervisors, rather than decide the question themselves in the first instance, while recognizing that the need for any referral will be

rare given the comprehensive guidelines already provided.[10]

SEC ALJs, although also circumscribed by APA and agency constraints in their policy-making role, have considerably more leeway for interstitial common-law decision-making. In contrast to non-adversarial determinations of benefit eligibility status, administrative enforcement proceedings will, by necessity, involve the refining of "statutory standards" through "case-by-case evolution." *SEC v. Chenery Corp*, 332 U.S. 194, 202-03 (1947). Here, at least by Petitioner's account, the ALJ's definition of "backtest" helped shape the course of the litigation. *See* Pet. Br. 7-8. While ultimately it is the Commission's final call, the opportunity for SEC ALJs to make these sorts of legal determinations even in the first instance is foreign to SSA ALJs, given the detailed agency policies and guidelines that cabin their discretion.

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[10] *See* HALLEX I-2-1090. HALLEX guidelines are not promulgated through notice and comment rulemaking and courts have recognized that they are not binding. *See Schweiker v. Hanson*, 450 U.S. 785, 789 (1981); *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000). The extent to which HALLEX guidelines bind SSA ALJs—particularly if they encroach upon an ALJ's independence in how hearings are conducted or may conflict with published regulations—is frequently litigated between AALJ members and SSA. The agency's position is that HALLEX is binding on all SSA employees, including ALJs. Whatever the propriety of the agency's position, it further supports the conclusion that its ALJs are federal employees, albeit sui generis employees who conduct due process hearings pursuant to the APA with concomitant quasi-judicial decision-making powers.

b. An additional distinguishing feature of the scope of authority exercised by SSA ALJs as compared to others is the nature of internal review mechanisms. In contrast to other agencies, the Appeals Council plays a critical role. *See generally* 20 C.F.R. §§ 404.900-.996, 422.205; *see also Mullen v. Bowen*, 800 F.2d 535, 536-37 (6th Cir. 1986) (en banc) (describing Appeals Council). Not only must claimants dissatisfied with an ALJ determination seek Appeals Council review to exhaust administrative remedies, 20 C.F.R. §§ 404.967, 416.1467, but the Council itself can (and often does), on case-specific own-motion review, review ALJ decisions *sua sponte*. *See id.* § 404.969(a).[11] In addition, as part of a more generalized quality review system, the agency selects a sampling of cases to review pre-effectuation. *See id.* §§ 404.969(b), 416.1469(b).

To preserve ALJ independence, SSA regulations bar the agency from conducting pre-effectuation reviews of ALJs' decisions based on the identity of a specific ALJ or the hearing office where the decision was made. 20 C.F.R. §§ 404.969(b)(1), 416.1469(b)(1). Instead, SSA uses random and selective sampling to pick decisions allowing benefits for such reviews. *Id.* The agency also undertakes special studies based on anomalies identified. *See generally* SSA, Office of Inspector General, Congressional Response Report,

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[11] Further support for recognizing that SSA ALJs are federal employees, not officers, is the fact that their decisions can be overturned by an Appeals Council staffed by employee attorney-advisors, who are exercising the Commissioner's delegated final decision-making authority.

The Social Security Administration's Review of Administrative Law Judges' Decisions, No. A-07-12-21234, at 6-7 (March 2012).[12] Through these various review processes, the SSA aims to ensure that ALJ decisions, overall, do not stray from mandated regulatory policy.

c. There is a rationale behind these constraints. This Court, nearly a half-century ago, recognized that the disability programs administered by SSA are of "a size and extent difficult to comprehend." *Richardson*, 402 U.S. at 399. And the workload has only grown since then. The number of ALJs employed by SSA, and the sheer quantity of cases they handle, is further indication that SSA ALJs are usually applying policies, not making them.

There are only five ALJs at the SEC, and the Federal Trade Commission and the Consumer Finance Protection Bureau, other agencies that pursue administrative enforcement actions, have only one apiece. *See* OPM, ALJs by Agency.[13] In contrast, some 1700 ALJs currently serve at the Social Security Administration. *See supra* note 2. And they handle a far greater number of cases, both overall and per judge.

During the first five months of fiscal year 2018, roughly 283,000 initial decisions were issued by SSA ALJs.[14] And although ALJs succeeded in reducing the

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[12] *Available at* https://goo.gl/8QDVfK.

[13] *Available at* https://goo.gl/Vf8UV4.

[14] *See* https://goo.gl/vhfLJA.

agency's backlog during this period, nearly 1,000,000 cases remain pending. *Id.* In contrast, fewer than 500 administrative proceedings are currently pending, at all stages, before the SEC.[18]

Management challenges for a hearing load of this magnitude have yielded the unique agency appeal structure and system of internal review described above. The agency has long "sought to balance the need for accuracy and fairness to the claimant with the need to handle a large volume of claims in an expeditious manner." Astrue Testimony, *supra*, at 3. The Social Security hearings system "must be fair—and it must work." *Richardson*, 402 U.S. at 399.

These twin goals are sometimes competing, reflecting a tension between the promise of individualized justice and a "need for efficiency" that is "self-evident." *Heckler*, 461 U.S. at 461 n.2. For years, "SSA and its independent-minded ALJs [have been] locked in a continuing struggle over the proper parameters of . . . management standards." Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 U.C.L.A L. REV. 1341, 1354 (1992). And *Amicus* AALJ has long fought to protect ALJ independence in setting the right balance. *See, e.g.*, *Ass'n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1143 (D.D.C. 1984) (recognizing that focusing review on ALJs with high allowance rates created an "atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof"); *Ass'n of Admin. Law*

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[18] *See* https://goo.gl/E9xMFY.

Judges v. Colvin, 777 F.3d 402 (7th Cir. 2015); *see also id.* at 406 (Ripple, J., concurring) (declining to assert jurisdiction over AALJ's challenge to SSA policy mandating number of cases to be decided annually and recognizing the "gnarled intersection" of the APA and the Civil Service Reform Act).

This ongoing tug-of-war reflects how SSA ALJs are subject to more levels and varieties of internal agency control than are their counterparts in other agencies. Such a high degree of agency review and supervision is yet another feature distinguishing them from SEC ALJs.

2. The nature of SSA ALJs' working conditions confirms they are federal employees. And they have long been classified as such by OPM, unionized as federal employees, and represented by AALJ under the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101 *et seq.*

Ultimately, whatever this Court decides about the constitutional officer status of SSA or other ALJs, it should have no bearing on their status as federal employees protected under federal labor laws. The Constitution has nothing to say about employee status under federal labor statutes, so even if deemed constitutional officers, ALJs can and should still be treated as employees under the relevant federal statutes. *Cf. Free Enterprise Fund*, 561 U.S. at 485-86 (noting provisions that Board members are not government officials for statutory purposes, but

parties' agreement that members are officers of the United States for constitutional purposes).

To start, and *contra* Pet. Br. 35-36, the APA uses the terms officers and employees interchangeably when describing ALJs. The statute that created ALJs thus "consistently uses the term 'officer' or the term 'officer, employee, or agent'" to "refer to [agency] staff members." Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 615 & n.11 (1948). But reference to simple "officers," rather than "officers of the United States" does not establish congressional intent to create an office. *See* Court-Appointed *Amicus* Br. 55. And in 1966, when Congress enacted title 5 into positive law, it replaced the term "officer" with the term "employee." *E.g.*, 5 U.S.C. § 554(d) (referencing "the employee who presides at the reception of evidence" under § 556, who "shall make the recommended decision or initial decision required by § 557"); *see* Court-Appointed *Amicus* Br. 55-56. This Court too, in its pathmarking decision on the protections afforded to hearing examiners under the APA, has used the terms officer and employee interchangeably. *Ramspeck*, 345 U.S. at 132.

What's more, the Government's decades-long unbroken course of conduct in engaging in collective bargaining with *Amicus* AALJ confirms that ALJs are protected federal employees under the FSLMRS. That statute defines employee as "an individual employed in an agency." 5 U.S.C. § 7103(a)(2)(A). And the definition of "professional employees," in 5 U.S.C. § 7103(a)(15),

readily encompasses ALJs, who regularly, and exclusively, make "determinations that require judgment and extensive educational background, the hallmark of professional employees." *U.S. Dep't of Homeland Sec., Bureau of Customs & Border Prot.*, 61 FLRA 485, 493 (2006). Although SSA ALJs' status as federal employees for collective bargaining purposes would not preclude inferior officer status under Article II, it is more consistent to consider ALJs employees in both contexts.

In sum, any Article II holding for SEC ALJs cannot resolve the constitutional status of ALJs in other agencies. And whatever the constitutional result, it is irrelevant to the question of whether ALJs are protected federal employees under the FSLMRS.

III. This Court Should Not Reach The Removal Question, But The APA Provisions Regarding Removal Are Constitutional.

A. The Removal Question Is Not Presented.

The Government alone asks this Court to apply the constitutional avoidance canon to reinvent the APA's "good cause" removal provision, 5 U.S.C. § 7521, because "[i]f Section 7521 were [not] construed" that way, it might "undermine the President's ability to supervise the actions of the Executive Branch" to an unconstitutional degree. U.S. Br. 48. There is no reason to reach this hypothetical question, and every reason not to.

First, the question was not pressed or passed on below, which is reason enough not to decide it here. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).[16] Second, there is no circuit law on the constitutional validity of the good cause removal standard for ALJs, much less a circuit split. Finally, the question is not only "not presented" here (Pet. Br. 38), it is a hypothetical that might not be presented at all. The Government does not argue that the APA is unconstitutional as written, but only that it *might* be unconstitutional *if* it were not construed to permit ALJ removal for misconduct, poor job performance, and failure to follow agency rules—even as the Government concedes that some ALJs *have* been removed on those grounds. *See* U.S. Br. 46.

Ultimately, the question of officer status under the Appointments Clause is entirely distinct from the question of how much Executive Branch supervision is enough under the Take Care Clause. There is thus no compelling reason for the Court to cast its long-established practice aside and to decide the removal question.

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[16] The Government usually agrees, even in cases raising the same separation of powers concerns. *See* Br. for United States in Opposition to Certiorari, *Scott v. FDIC*, No. 17-567, at 5-6 (arguing the Court should not review whether FDIC ALJs are inferior officers because the question was not pressed or passed upon below).

B. The APA Removal Provision Is Constitutional Because ALJs Perform Quasi-Judicial Functions and the APA Permits Sufficient Executive Control.

If the Court reaches the question, it should hold that the APA's ALJ-removal provision is constitutional. Even if ALJs are inferior officers, the careful balance achieved by Congress in the APA between political accountability and impartiality is entirely consistent with the Constitution and protects the Executive's authority and responsibility under the Take Care Clause.

1. At the outset, long-settled administrative practice and the very deliberate choices made by Congress to secure impartial administrative adjudications create a high bar for any claim that ALJ removal protections unconstitutionally impede the Executive's ability to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3.

The APA is, of course, a statute that comes to the Court with a presumption of constitutionality. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 n.9 (1983) (describing the "presumption of constitutionality afforded legislation drafted by Congress"). And limiting the grounds for removal of ALJs is a "'[l]ong settled and established practice'" since 1946, which "'is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (alteration in

original) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see id.* at 2560 (citing with approval the reliance of *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981), on one branch's acquiescence in a practice since 1952).

That long-settled practice carries added force here given the extensive study and deliberation undertaken by Congress in enacting the APA and resolving the pre-APA problem of unwarranted pro-agency bias in agency decision-making while ensuring plenary agency control over administrative policymaking. *See* pp. 6-7, *supra*; Pierce Br. 6-11; Forum Br. 4-9; FALJC Br. 4-7. AALJ joins those *amici* in urging that Congress's solution to the problems that plagued pre-APA administrative decision-making should not be overturned lightly, particularly when the proposed "solution" of increasing the power of agency heads over ALJ tenure could introduce the very bias that the APA was enacted to eradicate. *See, e.g.*, Pierce Br. 19-21; Forum Br. 20-21.

2. The Take Care Clause demands no such upending of congressional imperatives, even if ALJs are deemed inferior officers. As has been long established, and was recently reiterated in *Free Enterprise Fund*, Congress can, consistent with the Take Care Clause, choose to substantially limit the authority of the Executive Branch to remove officers, particularly for (i) inferior officers and (ii) officers exercising quasi-judicial authority. 561 U.S. at 492-94.

Congressional authority to limit the Executive's removal authority is thus at its zenith here, where both criteria are satisfied, and then some. If officers at all, ALJs are inferior officers who exercise quasi-judicial power. They are also subject to full "good cause" removal and other levers of executive supervision. Unsurprisingly, even as the Court in *Free Enterprise Fund* concluded that the Constitution, in unique circumstances, bars a combination of removal limits on principal and inferior officers, it recognized that ALJs are different because of their adjudicative function. 561 U.S. at 506-07, 507 n.10 ("[U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, *see* §§ 554(d), 3105, or possess purely recommendatory powers."). That recognition presages the correct holding here—that the APA's ALJ-removal provision does not unconstitutionally trench on executive power.

a. Inferior officer classification casts no constitutional doubt on statutes restricting the President's (or relevant principal officer's) removal authority. The power to remove is not expressly conveyed in the Appointments Clause and may be limited by Congress so long as the limitations do not impede the President's power and duty under the Take Care Clause. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 492-94. And it is well established that, with respect to inferior officers, Congress "'may limit and restrict the power of removal as it deems best for the public

interest.'" *Id.* at 494 (quoting *United States v. Perkins*, 116 U.S. 483, 485 (1886)).

What's more, even for *principal* officers, the President's removal authority may be limited to good cause when the officers exercise quasi-judicial authority, intended by Congress to operate with some independence from the Executive. *See Free Enterprise Fund*, 561 U.S. at 493 (because the FTC was "'quasi-legislative and quasi-judicial' rather than 'purely executive,' and . . . Congress could require it 'to act . . . independently of executive control,'" Congress could limit removal to good cause) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627-29 (1935)).

b. For ALJs, these two attributes—quasi-judicial power and subordinate status—are combined, maximizing Congress's power to shield ALJs from executive removal in furtherance of impartial decision-making. The APA's ALJ-removal provision satisfies the Take Care Clause given the adjudicative function of ALJs, the supervisory mechanism of good cause removal itself (including the involvement of the Merit Systems Protection Board (MSPB)), and the other levers of executive supervision over ALJ decisions under the APA.

First, ALJs fit comfortably within the recognized principle that Congress can limit the ability to remove quasi-judicial officers to serve the public interest in adjudicative impartiality. In *Wiener v. United States*, 357 U.S. 349 (1958), the Court considered whether the President could remove commissioners at will when

Congress established a Commission to adjudicate certain war claims "according to law." *Id.* at 349–51. Holding that the President could not do so, the Court found "the intrinsic judicial character of the task with which the Commission was charged" dispositive, because it indicated the body was intended to be "'entirely free from the control or coercive influence, direct or indirect,' of either the Executive or the Congress." *Id.* at 355–56 (quoting *Humphrey's Executor*, 295 U.S. at 629). The Court held that Congress's evident design to render the Commission impartial meant that "Congress did not wish to have hang over the Commission the Damocles' sword of [at will] removal." *Id.* at 356.

Like the commissioners in *Wiener*, ALJs address issues "to be 'adjudicated according to law,' that is, on the merits of each claim, supported by evidence and governing legal considerations," *id.* at 355, evidencing the "intrinsic judicial character" of the ALJs' task. Moreover, ALJs perform quasi-judicial tasks alone, not a mix of adjudicative, policymaking, and enforcement functions (unlike the Board in *Free Enterprise Fund*, 561 U.S. at 485-86). They are bound by executive policies embodied in rules and are prohibited under the APA from taking part in any agency investigation and enforcement functions, 5 U.S.C. § 554(d).

And, as in *Wiener*—arguably even more so, because the APA expressly addresses ALJ removal—Congress plainly intended to insulate ALJs from at-will removal in order to promote the adjudicative impartiality that it deemed necessary to serve the

public interest. Congress made the well-studied decision that ALJs could not act with sufficient impartiality if the "Damocles sword of removal" hung over their heads—while retaining executive accountability through the agency's ability to replace or negate any ALJ decision.

Second, the good cause removal provision provides ample executive supervisory authority and satisfies constitutional minimums, notwithstanding the role of the MSPB. Even with respect to a "purely executive" officer, the authority to remove for good cause is an important means of "supervising or controlling" an officer, and limiting removal to "good cause" does not "unduly trammel[ ] on executive authority." *Morrison v. Olson*, 487 U.S. 654, 690-91, 696 (1988). *A fortiori*, it satisfies the Take Care Clause for quasi-judicial officers like ALJs.

The APA does not limit the ordinary "good cause" standard in any way, unlike the removal standard at issue in *Free Enterprise Fund*, which allowed Board members' removal only upon a showing of "willful violations . . . willful abuse of authority; or unreasonable failure to enforce compliance." 561 U.S. at 503. And, contrary to the Government's suppositions (U.S. Br. 46-47), the removal of ALJs for a variety of reasons confirms that "ordinary" good cause applies. Among other things, ALJs have been removed (sometimes over AALJ's protest) for being absent for extended periods, declining to set hearing dates, having a high rate of significant adjudicatory errors, not following mandatory rules, and deciding too few

cases. *See* U.S. Br. 46; Forum Br. 22; Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RESERVE L. REV. 1083, 1109 & nn. 134-36 (2015); Kent H. Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 807 (2013); *see also e.g.*, *Shapiro v. Soc. Sec. Admin.*, 800 F.3d 1332 (Fed. Cir. 2015); *Abrams v. Soc. Sec. Admin.*, 703 F.3d 538 (Fed. Cir. 2012). Good cause removal thus remains an important and powerful tool of executive accountability, without the interpretive gloss the Government urges.[17]

Furthermore, the role of the MSPB as a neutral arbiter of good cause does not unconstitutionally attenuate executive control, nor create the same kind of "dual for-cause limitations on . . . removal" at issue in *Free Enterprise Fund*, 561 U.S. at 492, even though there are limits on the President's ability to remove the members of the MSPB, 5 U.S.C. § 1202(d).[18] The agency,

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[17] Outside of litigation, the Executive Branch recognizes that a congressional amendment, not a judicial re-interpretation, is required to meaningfully alter the APA's removal provision for ALJs. The Social Security Administration has sought, in its fiscal year 2019 budget, an amendment to the APA that would, among other things, create "probationary periods for newly hired ALJs" and "allow the faster removal of ALJs." Social Security Administration, *Fiscal Year 2019 Budget Overview*, at 28, https://goo.gl/WKCAKJ.

[18] The constitutionality of the APA's ALJ removal provision likewise does not depend on the happenstance of whether an ALJ is assigned to an agency headed by an officer who can be removed by the President at will, or not. Even the Government's argument does not turn on whether "the Department Head is permissibly insulated from presidential removal at will." U.S. Br. 52 n.8. Given that ALJs are fungible across agencies under the APA, *see* p. 10,

not the MSPB, decides if there is good cause to remove an ALJ and initiates a removal. 5 U.S.C. § 7521(a) ("An action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed. . . ."). That the agency must prove good cause to the MSPB, *id.*, is akin to judicial review, which is constitutional (*e.g.*, *Morrison*, 487 U.S. at 686), even though the Executive lacks authority to remove Article III judges.[19]

Finally, the limited nature of ALJ authority and the additional tools of executive supervision must be factored into the calculus of whether the Executive Branch exercises sufficient supervision over ALJs. *See Morrison*, 487 U.S. at 696 (holding that executive supervision of an independent counsel was constitutionally sufficient when, *inter alia*, the counsel's jurisdiction was defined and limited and the governing statute "requires that the counsel abide by Justice Department policy unless it is not 'possible' to do so"). ALJs, too, are bound by agency policy, and there are many other executive supervisory tools available—including the agency's authority to completely replace each and every one of

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supra, it would be odd if the constitutionality of their tenure protections waxed and waned with each different agency assignment.

[19] In objecting to the MSPB's role, the Government would permit the MSPB to find facts, yet be bound by the agency's position that the asserted facts are "good cause." U.S. Br. 52. Such an interpretation—under which "good cause" means nothing more than requiring proof of whatever facts the agency decided justified removal—would render the concept of "good cause" meaningless and cannot be squared with the APA.

the ALJ's decisions that it disagrees with. This substantive control provides complete accountability within the Executive Branch for any decision issued by an ALJ.

In sum, far from being a recent and unprecedented innovation, *see Free Enterprise Fund*, 561 U.S. at 505-06 (stressing the "lack of historical precedent" in holding particularly restrictive dual for-cause removal limitations unconstitutional), the practice of limiting ALJ removal to good cause (as proved to the MSPB) has a settled historical pedigree and falls within a long line of precedents recognizing the authority of Congress to limit removal authority for quasi-judicial officials like ALJs to foster the adjudicative impartiality that Congress has judged critical to the public interest. *See* 5 U.S.C. § 556(b). Good cause removal, coupled with plenary agency control over ALJ decisions, safeguards the Executive's authority to faithfully execute not only the laws governing the matters under decision, but also the APA's guarantees of an impartial hearing officer and procedural fairness.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed; this Court should clarify that any ruling with respect to SEC ALJs does not extend to ALJs from other agencies; and should likewise confirm, if it reaches the removal question at all, that current ALJ removal protections are constitutionally sound.

Respectfully submitted,

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